

Next Advisor, Inc. v. LendingTree, Inc., 2016 NCBC Order 3.

STATE OF NORTH CAROLINA  
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
15 CVS 20775

NEXT ADVISOR, INC.,  
Plaintiffs,

v.

LENDINGTREE, INC. and  
LENDINGTREE, LLC,  
Defendants.

**ORDER ON DEFENDANTS' MOTION  
FOR PROTECTIVE ORDER**

1. **THIS MATTER** is before the Court upon Defendants LendingTree, Inc. and LendingTree, LLC's (collectively, "Defendants") Motion for Protective Order (the "Motion for Protective Order") in the above-captioned case. After considering the Motion for Protective Order, briefs and materials filed in support of and in opposition to the Motion for Protective Order, and the arguments of counsel at a hearing held on January 13, 2016, the Court **DEFERS** ruling pending the parties' submissions of supplemental materials.

2. On November 6, 2015, Plaintiff filed a Motion for Expedited Discovery concurrently with its Complaint. The Motion for Expedited Discovery sought the Court's permission for Plaintiff to engage in limited initial discovery on an expedited basis. In its response brief in opposition to the Motion for Expedited Discovery, Defendants objected, in part, on the basis that Plaintiff had not sufficiently described its alleged trade secrets with particularity as required before obtaining any discovery, not merely expedited discovery, of Defendants' own trade secret information. *See generally DSM Dyneema v. Thagard*, 2014 NCBC LEXIS 51 (N.C. Super. Ct. Oct. 17, 2014).

3. On December 11, 2015, the Court entered an Order denying Plaintiff's Motion for Expedited Discovery. The Court additionally concluded that a determination concerning whether

Plaintiff had identified its trade secrets with sufficient particularity to obtain discovery of Defendants' trade secret information had been placed at issue by Defendants' opposition to the Motion and was ripe for decision. The Court therefore deemed Defendants' opposition to Plaintiff's Motion for Expedited Discovery to be a Motion for Protective Order – the current Motion – and permitted the parties the opportunity to fully brief the issue.

4. This Court has observed that a plaintiff is required to identify its alleged trade secrets with reasonable particularity before a defendant is required to produce its own trade secret information in discovery. *DSM Dyneema*, 2014 NCBC LEXIS 51, at \*16. Although this standard “does not require Plaintiff to ‘define every minute detail of its trade secrets down to the finest detail or require a mini-trial on misappropriation’ before Plaintiff is granted discovery of [Defendants’] trade secret information, Plaintiff’s identification must be sufficiently particular to put [Defendants] on notice of the specific nature of Plaintiff’s trade secret claims and allow [Defendants] and the Court to determine the relevance of Plaintiff’s requested discovery.” *Id.* at \*18.

5. On December 22, 2015, Plaintiff filed its brief in opposition to Defendants' Motion for Protective Order along with a Second Affidavit of Robert Erik Larson (“Mr. Larson”), Plaintiff's President and Chief Executive Officer. Plaintiff contends that paragraphs 16, 17, and 21 of its Complaint provides “robust and specific identification of the trade secret information it alleges that [Defendants] misappropriated[.]” (Pl.’s Br. Opp. Defs.’ Mot. Protective Order 7.) Plaintiff asserts that an even more specific description is contained in paragraphs 16 and 17 of Mr. Larson’s Second Affidavit. Defendants assert in their reply, however, that neither Plaintiff’s Complaint, nor Mr. Larson’s Second Affidavit identifies Plaintiff’s trade secrets with sufficient particularity.

6. After filing its opposition brief and Mr. Larson's Second Affidavit, Plaintiff served its responses to Defendants' first set of interrogatories on January 11, 2016, and filed a copy of these responses with the Court in a sealed filing on January 12, 2016, less than 24 hours before the Court's scheduled hearing on the Motion for Protective Order on January 13, 2016. Plaintiff's response to Interrogatory No. 3 ("Response No. 3") contains a further description of eight categories of Plaintiff's alleged trade secret information that it contends Defendants have misappropriated. In addition, at the January 13 hearing, Plaintiff provided the Court with several exemplar documents that Plaintiff has produced to Defendants in discovery that Plaintiff contends further identify and describe the alleged trade secret information that Plaintiff contends Defendants have misappropriated.

7. Based on its examination of Plaintiff's January 12 and 13 submissions, the Court concludes that examination of additional exemplar documents from Plaintiff's document production will assist the Court in its resolution of the Motion. In light of the limited time available for Defendants to respond to Plaintiff's January 12 and 13 submissions prior to the hearing, the Court also believes it is fair and appropriate to provide Defendants a more complete opportunity to respond to Plaintiff's January 12 and 13 submissions. The Court therefore concludes that it should defer ruling on the Motion for Protective Order to permit Plaintiff an opportunity to submit an exemplar document for each of the eight categories of its trade secret information as identified in its Response No. 3, and, after Plaintiff has done so, to permit Defendants an opportunity to respond to Plaintiff's supplemental submissions.

8. The Court's December 11, 2015 Order also ordered that, notwithstanding the Court's determination of the issue of whether Plaintiff had sufficiently identified its alleged trade secrets, both parties were to continue to provide responses to requested discovery by the applicable

deadlines and bring any issues to the Court's attention for consideration at the January 13 hearing. The parties initially raised in their pre-hearing submissions three areas of disagreement, one of which the parties advised at the hearing had been resolved. As to the second issue, involving the revenue and profit of Defendants' credit card marketing business during three specific quarters, the parties represented at the hearing that Defendants had agreed to produce material that Plaintiff anticipated would satisfy Plaintiff's request.

9. As to the third issue, it appears that Defendants have withheld from production certain documents Defendants deem "especially sensitive," which Defendants also acknowledge they do not consider to constitute trade secrets. Plaintiff contends Defendants must produce these documents now; Defendants contend they should not have to produce these documents until the Court is satisfied that Plaintiff has identified its trade secret information with reasonable particularity. It appears to the Court that it is very likely that Defendants will be required to produce these documents during the course of the litigation and that the current dispute is largely one of the timing of that production. In light of the circumstances of this case, including the nature of the alleged wrongdoing and Plaintiff's intention to seek injunctive relief in the near future, the Court concludes, in the exercise of its discretion, that Defendants should be required to produce at this time all responsive documents which do not contain information that Defendants in good faith believe to be its trade secret information, without prejudice to their right to challenge Plaintiff's identification of Plaintiff's trade secrets.

10. Accordingly, the Court hereby **DEFERS** ruling on the Motion for Protective Order and **ORDERS** as follows:

- a. If available, Plaintiff shall file under seal from among the documents that Plaintiff has produced in discovery to Defendants one exemplar document

for each of the nine categories of alleged trade secret information in Plaintiff's Response No. 3 no later than January 22, 2016. Any statement or explanation accompanying Plaintiff's submissions shall not exceed the word limit for reply briefs contained in Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

- b. Defendants shall submit a response to Plaintiff's submissions no later than January 29, 2016, such submission not to exceed the word limit for reply briefs contained in Business Court Rule 15.8.
- c. Defendants shall produce to Plaintiff all documents responsive to Plaintiff's discovery requests which do not contain information that Defendants in good faith believe to constitute their trade secret information, without prejudice to Defendants' right to challenge Plaintiff's identification of Plaintiff's trade secrets, no later than January 25, 2016, such response period to be extended only with consent of the parties or for good cause shown.
- d. Plaintiffs shall notify the Court no later than January 22, 2016 in the event Plaintiffs seek to maintain their objection to Defendants' response to Plaintiff's document request nos. 7–10 concerning the revenue and profit of Defendants' credit card marketing business as described in paragraph 8 above.

**SO ORDERED**, this the 19th day of January, 2016.

/s/ Louis A. Bledsoe, III  
Louis A. Bledsoe, III  
Special Superior Court Judge  
for Complex Business Cases